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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-831

CROWN CENTRAL PETROLEUM CORPORATION,
Petitioner,

v.

JOHN T. PHILLIPS, JR., CORRADO FRANK TUMMINELLO, CHARLES PHILIP FREITAG AND CARROLL CHARLES MYERS,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PRELIMINARY STATEMENT

This brief in opposition to petition for a writ of certiorari is submitted on behalf of John T. Phillips, Jr., Corrado Frank Tumminello, Charles Philip Freitag and Carroll Charles Myers, the successful plaintiffs in these consolidated private antitrust actions for damages and injunctive relief. The cases were instituted in 1973 by them pursuant to 15 U.S.C. 1, 15 and 26 against their supplier-landlord, defendant Crown Central Petroleum Corporation ("Crown"), a refiner and marketer of gasoline.

In an event unusual in antitrust enforcement, as a result of these private actions alleging *inter alia*, horizon-

tal retail price-fixing of gasoline in the Baltimore metropolitan area, the United States convened a grand jury and ultimately secured an indictment and conviction of Crown's co-conspirators on charges of horizontal price-fixing, involving approximately seventeen billion gallons of gasoline valued at some four billion dollars, in seven Middle Atlantic states from Virginia to New York. *United States v. Soceity of Independent Gasoline Marketers of America, et al., ("U.S. v. SIGMA")*, Criminal No. B-76-0314 (D. Md.), convictions affirmed, 1979 Trade Cases ¶ 63,097 (4th Cir. 1979).

The Opinion of the United States Court of Appeals for the Fourth Circuit, from which Crown petitions for a writ, affirmed the opinions of the United States District Court for the District of Maryland holding, *inter alia*, that Crown violated Section 1 of the Sherman Act by engaging in horizontal and vertical conspiracies to fix the price of gasoline, and that plaintiffs were entitled to damages for the overcharges they paid to Crown as a result of the horizontal price-fixing conspiracy among Crown and its oil company competitors, a conspiracy which was designed to maintain and increase the revenues and profits which Crown derived from the sale of gasoline to plaintiffs and its other dealers.

Crown's petition confuses essential facts upon which the damage award is predicated; facts which refute its argument that plaintiffs did not purchase gasoline from it at unlawfully fixed wholesale prices. Crown next misconceives the rules established by this Court governing the applicability of the pass-on defense, ignoring both the facts of this case and pertinent authority. Crown seeks here to redefine this Court's holding in *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 (1977) ("*Illinois Brick*") in order to support its view that, because it is guilty of two *per se* violations of Section One of the Sherman Act, 15 U.S.C. 1, rather than one such violation, plaintiffs, the direct

purchasers of gasoline from it at unlawfully fixed prices, and the victims of both *per se* violations, should be denied all recovery under the antitrust laws.

As this brief will demonstrate, Crown has advanced contradictory arguments before the courts in this case, in search of the goal of avoidance of damage liability for its established violations of the Sherman Act. This is not an interest which supports review of the case in accordance with Rule 19 of this Court.

OPINIONS BELOW

Crown's statement in this section of its petition, indicating that the Court of Appeals was "divided" (Petition, hereinafter "Pet.", p. 2), should be placed in proper context.

On July 2, 1979 the United States Court of Appeals for the Fourth Circuit (in an opinion by Wilson Cowen, Senior Judge, joined by Clement Haynsworth, Chief Circuit Judge) affirmed findings of fact and conclusions of law by the United States District Court for the District of Maryland (Alexander Harvey, J.) establishing, *inter alia*, (a) that Crown and its co-conspirators, other "independent" oil companies and an industry trade association, had engaged in unlawful horizontal price-fixing; (b) that Crown had engaged in unlawful vertical price-fixing by coercing its lessee-dealers to charge retail prices dictated by Crown; and (c) that plaintiffs were entitled to the award of damages as a result of being overcharged direct purchasers from Crown at wholesale prices which were necessarily unlawfully fixed as a result of a Crown formula by which the wholesale price charged to plaintiffs was determined mechanically and automatically from the retail prices which were unlawfully fixed by the horizontal conspiracy among Crown and its co-conspirator oil companies. 602 F.2d 616 (4th Cir. 1979) (Pet. App. A, p. 1a *et*

seq).[1] The purpose of the horizontal conspiracy was not to enhance the revenues and profits of service station dealers supplied by Crown and the oil company co-conspirators, but rather to maintain and increase the profits of Crown and its co-conspirators.

Circuit Judge Widener, concurring in part and dissenting in part, stated "I concur with the substantive holdings of the panel . . . ." 602 F.2d at 636. His dissent was based solely on one aspect of the District Court's conduct of a hearing. 602 F.2d at 636 (Pet. App. A, p. 34a).

On August 27, 1979, the Fourth Circuit denied Crown's motion for a rehearing (Pet. App. B).[2]

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[1] References herein to "Pet. App." are to the appendices accompanying Crown's petition. References to "Res. App." are to the appendices accompanying this Respondent's Brief in opposition to the petition.

[2] In view of his concurrence with the Court in its "substantive holdings" (*supra*), the dissenting Judge's vote to grant rehearing was predicated again on the District Court's conduct of a hearing, which was one of the grounds for rehearing urged by Crown. Crown has not presented that issue here; it has presented no issue with respect to the Court of Appeals' affirmance of the findings of price-fixing which are the basis of the permanent injunction (Pet. p. 4, n. 1). The issue presented here by Crown concerns solely the award of overcharge damages, which are the only damages awarded plaintiffs (Pet. pp. 3, 4, n. 1).

Thus, none of the three appellate Judges believed that a review by this Court would be appropriate, a conclusion reaffirmed by the Court's unanimous refusal, on September 6, 1979, to stay its mandate pending the filing of Crown's petition for *certiorari* (Res. App. A). Under the rules of the Fourth Circuit, a stay will be granted when a Judge concludes that "a substantial question is to be taken to the Supreme Court of the United States." (See, "Policy Statement: Stays of Mandates," by the United States Court of Appeals for the Fourth Circuit) (Res. App. B).

QUESTIONS PRESENTED

The four Crown lessee-dealer plaintiffs in this case were the direct purchasers from defendant Crown. The wholesale prices which they paid to Crown for gasoline were not merely, as Crown states, "influenced" by the fixed retail prices, nor did they bear merely "some" relationship to those prices (Pet. p. 3, 7). The wholesale overcharge was not, as Crown states, "presumed." (Pet. p. 12). Rather (as admitted by Crown, as embodied in its documents, and as found by the Court of Appeals and the District Court), in accordance with a predetermined formula employed by Crown, the wholesale prices Crown charged to plaintiffs were necessarily fixed and established automatically from the retail prices — which retail prices were unlawfully established as a result of a horizontal price-fixing conspiracy among Crown and its oil company co-conspirators. The question presented here is whether, where the dealers were direct purchasers at unlawfully inflated wholesale prices, and the Court of Appeals has affirmed an overcharge damage award in recognition of the basic principles set forth by this Court in *Illinois Brick* and in *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) ("*Hanover Shoe*"), this Court should nevertheless grant *certiorari* for the purpose of abrogating those basic principles.

STATEMENT OF THE CASE

A. *The Liability Case*

Plaintiffs filed these consolidated actions, hereinafter referred to as *"Phillips v. Crown"*, in April and May, 1973. After these suits were filed, Crown notified each plaintiff that it would not renew his lease. Following discovery and a hearing, the District Court issued a preliminary injunction enjoining such non-renewal *pendente lite*. 376 F. Supp. 1250 (D. Md. 1973). Following further extensive discovery,

the liability case was tried to the Court during four weeks in late 1974. After hearing testimony from over forty witnesses and reviewing some 250 exhibits, (JA. 2652-53)[3], the District Court issued an Opinion containing 98 findings of fact, holding *inter alia* that Crown had engaged in unlawful horizontal and vertical price-fixing, that it had unlawfully sought to terminate plaintiffs' leases, and that plaintiffs' were entitled to a permanent injunction and treble damages. 395 F. Supp. 735 (D. Md. 1975) (Pet. App. C). Crown appealed from this liability judgment.

On February 17, 1977, while Crown's liability appeal was pending, the District Court issued its opinion on damages and attorneys fees. 426 F. Supp. 1156 (D. Md. 1977). After the Court of Appeals initially remanded the original liability opinion for a hearing in April, 1977, 556 F.2d 702 (4th Cir. 1977), the District Court held the hearing, and, after consideration of further submissions by the parties, reaffirmed its holdings of unlawful horizontal and vertical price-fixing. 1977 Trade Cases ¶61,599 (D. Md. 1977). Crown then appealed both the liability and damage judgments. On July 2, 1979, the Court of Appeals affirmed the District Court's findings of illegal horizontal and vertical price-fixing in the Baltimore metropolitan market and findings of unlawful lease terminations. The Court affirmed the award of damages for the overcharge resulting from the price-fixing. 602 F.2d 616 (4th Cir. 1979) (Pet. App. A).

The gravamen of this case was the charge that Crown conspired with other non-major ("independent") oil companies in order to eliminate price competition in the Baltimore metropolitan market. Crown's profits were secured from sales of gasoline to its dealers, at wholesale

[3] References to "JA" are to the Joint Appendix filed by the parties in consolidated appeals No. 77-1780 and No. 78-1078, which resulted in the opinion from which Crown now seeks review.

prices fixed in accordance with an immutable formula based upon the (horizontally fixed) retail prices. Thus, Crown's only interest in participating in the conspiracy, increasing retail prices by agreement with its horizontal co-conspirators, was to maintain and increase its own profits secured from wholesale sales to plaintiffs and its other dealers, in its most important marketing area.[4] The purpose of the horizontal price-fixing conspiracy was *not* to increase the profits of retail service station dealers, and horizontal price-fixing was not engaged in by those service station dealers; it was engaged in by the oil companies which supplied those dealers (or, in some cases, by the oil companies which supplied their own company-operated service stations) in order to maintain and increase their profits.

As set forth in the Court of Appeals Opinion, 602 F.2d at 635 (Pet. App. A, pp. 32a-33a) and the District Court liability Opinion, 395 F. Supp. at 742-43, 747 (Pet. App. C, pp. 47a-48a, 56a), the pricing structure of the market was substantially affected by the price level at which the "independent" marketers sold. Such marketers included Crown, Amerada Hess Corporation ("Hess") (which, like Crown, marketed through independent lessee-dealers), Petroleum Marketing Corporation ("PMC") (which resold gasoline through its company [not dealer] operated "Scot" stations), Ashland Oil Inc. ("Ashland"), (which supplied and later acquired BiLo and Red Head service stations), and Meadville Corporation (which resold through "Saveway" company-operated stations).

The independents, which traditionally did not engage in the broad-scale service bay operations or advertising of the major oil companies, competed with the majors by main-

[4] Crown's headquarters are in Baltimore and, by 1973, it was the fifth ranking gasoline marketer in Maryland, surpassing many "major" oil companies. 395 F. Supp. at 741 (Pet. App. C, p. 43a).

taining a differential in price below the majors. The "accepted" differential was approximately two cents; if the independents engaged in price competition among themselves which drove their prices lower and widened the differential, the major oil companies would react by instituting voluntary allowances (wholesale price discounts to their dealers), necessarily established across wide price "zones", reducing the majors' level of pricing. Thus, the overall price level of the entire market would be reduced; the wholesale prices and profits of an "independent" oil refiner such as Crown would be reduced if the independents did not avoid the price competition which reduced their retail prices and which induced retaliation by the major oil companies.

Crown was well aware of the dangers to its wholesale prices and profits which price competition among the independents posed, and acted in concert with its independent oil company competitors to prevent price competition and to eliminate the extremely rare (602 F.2d at 632; Pet. App. A, p. 26a) instances of price competition among the independents. A particularly clear example, cited by the District Court, 395 F. Supp. at 742-43, (Pet. App. C, pp. 47a-48a) and Court of Appeals, 602 F.2d at 623, (Pet. App. A, p. 8a) was the effort by Crown's Manager of Administration (Marketing) (its pricing manager) Wilbur Pressler to halt an incident of price competition which broke out in West Baltimore. Pressler testified that he interceded with executives of Ashland and Meadville to restore prices to higher levels since "a continuation of price-cutting was going to hurt the entire market area and that no one [of the conspirators] was going to profit from it." (JA 334). When asked whether his purpose was to stop price competition in Baltimore, Pressler conceded that "it could possibly be construed that that would have been

the motive." (JA 336; see 602 F.2d at 623; Pet. App. A, p. 8a).[5]

The evidence established that Crown and its co-conspirators consulted with each other in order to avoid price competition; to eliminate the few instances of price competition which arose; and to notify each other of planned future price movements in order to achieve coordinated price increases (or, on the rare occasions when a price decrease was deemed necessary, to discuss and explain this in advance in order to avoid a reaction by other independents). Crown's communications with Pricing Manager Irving Grossman of Hess were particularly notable; Crown pricing managers maintained contact with Hess, its chief competitor, to discuss and resolve any problem involving the threat of price competition (E.g., JA 295-97, 315-16).[6]

The District Court, in its findings of fact, 395 F. Supp. at 742-46 (Pet. App. C, pp. 46a-54a) and its discussion, 395 F. Supp. at 757-59 (Pet. App. C, pp. 76a-79a) and the Court of Appeals in its discussion, 602 F.2d at 623-24 (Pet. App. A, pp. 8a-10a) outlined the evidence of advance notification of

[5] Pressler's assistant pricing manager testified that incidents of price competition, if not stamped out, would spread into a price war across the city "like cancer" (JA. 1909). He testified that this was a particular problem for Crown in Baltimore, its headquarters, since "Crown is a lot more concentrated in Baltimore than any other company." (JA. 1913). By 1972 Crown supplied gasoline to 34 high volume "multi-pump" stations in Baltimore (JA. 1772).

[6] Both Crown and Hess pricing chiefs confirmed that even isolated instances of discount pricing, if unchecked, would generate widespread competition by forcing major oil companies to react across wide geographic areas (JA 310-11, 327-28); 395 F. Supp. at 742-43 (Pet. App. C, pp. 47a-48a). Grossman of Hess testified that such reactions would occur even if the "differential" widened to 3-4 cents and, when one major reacted, this would cause a chain reaction, and a large scale price war (JA 310-11).

and discussion of price movements among Crown and its co-conspirators Hess, PMC, Ashland and Meadville; their agreements (express and implied) to eliminate price competition; and their use of an industry organization, the Society of Independent Gasoline Marketers of America ("SIGMA"), to inform the conspirators of future price increases, to coordinate such increases, and to act to stamp out isolated instances of price competition which threatened market stability and the profits of the conspirators. This evidence was based almost exclusively on testimonial and documentary admissions by representatives of the conspirators.[7]

The Court of Appeals concluded that the District Court's finding of horizontal price-fixing among Crown and its co-conspirators were supported by a "formidable array of evidence" which confirmed that "Crown participated in an elaborate conspiracy . . . to fix the retail price of gasoline in the Baltimore area in the early 1970s." 602 F.2d at 625 (Pet. App. A, p. 12a).[8]

[7] Documentary admissions of horizontal price-fixing are, of course, rare gems. Co-conspirator PMC's wholesale sales manager Jack Curlett, however, was a copious record keeper; in one 1971 diary entry, he reported on a meeting with a company which operated retail service stations in competition with PMC and other conspirators:

> We are working to get them to get prices up in Baltimore area. Call Hess and Saveway — have Grossman call Jim (JA. 1927-28).

[8] The District Court found further (and the Court of Appeals affirmed) that Crown coerced its dealers to charge retail prices dictated by Crown (vertical price-fixing) — a necessary device by which Crown (which had dealer, not company-operated stations) insured that its horizontal agreements with its competitiors were carried out. 395 F. Supp. at 761 (Pet. App. C, p. 83a); see 602 F.2d at 626 (Pet. App. A, p. 14a). The District Court's findings of fact (hearinafter "FF") concerning vertical price-fixing, FF 33-44, 47-74; see 395 F. Supp. at 746-54 (Pet. App. C, pp. 54a-69a) begin with a documentary admission (FF 35) by Crown's Vice-President that supposedly independent Crown dealers' pump prices were instead to be set "at Crown's discretion", an admission the Court of Appeals found "devastating". 602 F.2d at 626-27 (Pet. App. A, p. 15a); see 395 F. Supp. at 746-47 (Pet. App. C, p. 55a). This document also set forth the Crown formula which established that a dealer's *wholesale* price was entirely dependent upon and moved in a fixed relationship with the retail price (FF 35, 38; see 395 F. Supp. at 746-47, 758) (Pet. App. C., pp. 55a-56a, 78a). See 426 F. Supp. at 1161 (Pet. App. D, pp. 107a-108a). Substantial evidence supporting the vertical price-fixing findings was presented through non-party witnesses. 602 F.2d at 627 (Pet. App. A, p. 16a); 395 F. Supp. at 748, 751-53 (FF 47, 62-70; Pet App. C, pp. 58a, 64a-67a). The vertical price-fixing findings were supported by "ample" evidence. 602 F.2d at 626 (Pet. App. A, p. 15a).

Phillips v. Crown, a private action, is a rare event in antitrust enforcement. As the District Court stated in its opinion on damages and attorneys fees, 426 F. Supp. at 1174 (Pet. App. D, p. 135a), as a result of this case, alleging horizontal price-fixing in Baltimore, the United States undertook a grand jury investigation of horizontal price-fixing by Crown and its co-conspirators. On June 1, 1976 Crown, its co-conspirators in *Phillips*, and others, were indicted for conspiracy to horizontally fix retail gasoline prices in Maryland, New York, New Jersey, Pennsylvania, Delaware, Virginia, and the District of Columbia, a conspiracy involving approximately 17 billion gallons of gasoline valued at some four billion dollars. *U.S. v. SIGMA, supra*. After a three month trial, on August 29, 1977, nearly every corporate defendant, including co-conspirators here Hess, PMC, Ashland, Meadville and SIGMA, as well as Kayo Oil Company, were found guilty by a federal court jury in Baltimore. The only corporate defendant (aside from the parent of Kayo, which was exonerated on a question of corporate control) which escaped was, ironically, Crown, the only local company. Crown, however, stands adjudged liable by a clear preponderance of the evidence in *Phillips v. Crown*, a judgment it has not presented to this Court for review. The convictions of the corporate defendants in *U.S. v. SIGMA* were

affirmed on December 26, 1979. 1979 Trade Cases ¶ 63, 097 (4th Cir. 1979).[9]

B. *The Damage Award*

The District Court found that the horizontal price-fixing conspiracy was "largely successful". 395 F. Supp. at 746 (Pet. App. C., p. 54a). Like most conspiracies, it was not 100% successful; it was the failure of Crown and its co-conspirators to enlist a non-conspirator in their price-fixing efforts which furnished plaintiffs' economist a basis, unusually concrete for antitrust damage analysis (compare *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-67 (1946)), upon which to calculate plaintiffs' "overcharge" damages resulting from the conspiracy.[10]

As the District, Court found, Crown attempted, but failed, to enlist the support of Phillips Petroleum, a "major" oil Company, in raising prices in the York and Padonia Road area of suburban Baltimore. (This is a major artery which feeds downtown Baltimore; JA. 2044.) A dealer-operated Crown station competed in that area with co-conspirator Hess and Scot (PMC) stations, and with Phillips Petroleum. In 1971, in an effort to stabilize prices in the area, Crown contacted Phillips Petroleum in

[9] Circuit Judge Widener, who concurred in the "substantive holdings" of the panel in *Phillips v. Crown*, was also on the panel in *U.S. v. SIGMA*. He concurred in all convictions of the corporate defendants in *U.S. v. SIGMA*, with one exception resulting from a disagreement regarding a question of evidentiary use of hospital records. 1979 Trade Cases ¶63,097 at p. 77,461.

[10] Crown does not challenge here the calculation of damages; again, it contends only that plaintiffs were not the overcharged direct purchasers (Pet. p. 3). Crown ignores the fact that the *overcharge* which the participant in the conspiracy (Crown) received was obtained from plaintiffs and other Crown dealers, the direct purchasers from the conspirator.

Maplewood, New Jersey for the purpose of causing the competing Phillips station to raise its retail prices. However, Crown was unsuccessful in inducing Phillips Petroleum to participate in curing this rare instance of price competition. It was reported to Crown Vice-President of Sales Loving, as he admitted, that the communication with Phillips Petroleum had yielded "No Action. No results. No action." (FF 19, 395 F. Supp. at 743) (Pet. App. C, pp. 48a-49a). Crown Regional Manager Cahir advised Loving of the situation, and Loving informed Cahir that Crown would have to maintain a lower wholesale price to its dealer in that area, Crown station number "P-57" (JA. 369). Crown and its co-conspirators admitted, as discussed *supra*, that such an area of price competition threatened the stability of the entire market, a matter of particular concern to Crown, which was admittedly more "concentrated" in the Baltimore area than any other company (JA. 1913).[11]

Plaintiffs' expert damage witness was Dr. Carl F. Christ, Professor of Economics at The Johns Hopkins University. Dr. Christ, who has also held professorial positions in economics at the University of Chicago and at foreign universities, has been one of the Editors of the *American Economic Review*, and was published in the *Congressional Record* in 1974 concerning the "United States Oil Problem." Dr. Christ also holds a degree in physics, has taught at Princeton University, and particpated in the Manhattan Project (JA. 2149-54). He was recognized by Crown and the

[11] Crown Baltimore District Manager Gillespie admitted that Crown's policy was to achieve at its dealer stations "uniformity of price," and a stable market (JA. 457-58). Crown admitted that it informed its dealers that its policy was uniform dealer pricing (JA. 756-58). (It did so admittedly at the same time that it informed them that their leases could be cancelled without cause on five days notice (JA. 749)). Moreover, the market *was* stable — and there were several periods of time during the damage period, one of approximately six months, during which *all* Crown dealers were charged the same price. (JA. 2108).

District Court to be an "eminent" economist (JA. 2149, 2273; 426 F. Supp. at 1169) (Pet. App. D, p. 125a).

In its damage opinion, the District Court restated the basic finding ignored here by Crown:

> Although this Court has concluded that Crown conspired with its competitors horizontally to fix the *retail* prices of gasoline, the resulting injury to the plaintiffs arises because of the wholesale prices charged by Crown. Such is the necessary result of Crown's method of pricing its gasoline. Because Crown first decided on the appropriate retail price to be charged for its gasoline and then worked back to the wholesale price to be charged the dealer (citation omitted) any artificially high *retail* price necessarily increased the *wholesale* price above the competitive level (citation omitted). 426 F. Supp. at 1161 (Pet. App. D., pp. 107a-108a) (emphasis by the Court).[12]

The District Court, 426 F. Supp. at 1161-62 (Pet. App. D, pp. 107a-110a) and Court of Appeals, 602 F.2d at 632 (Pet. App. A, pp. 26a-27a) explained Dr. Christ's calculation of the overcharge to plaintiffs as a result of the horizontal price-fixing. Dr. Christ calculated the overcharge to plaintiffs as follows: The overcharge was the average per gallon difference between Crown's wholesale price charged to plaintiffs and the wholesale price charged to Crown

[12] In its liability opinion, the District Court found that there was a "fixed and constant relationship between the [Crown wholesale and retail] prices" 395 F. Supp. at 758 (Pet App. C, p. 78A). This was in accordance with the Crown formula, which determined the wholesale price "by deducting a predetermined margin from the actual retail price to be posted by the dealer". FF 38; see FF 35, 395 F. Supp. at 746-47 (Pet. App. C, pp. 55a-56a).

The Court of Appeals confirmed the accuracy of these findings, holding that the retail price "predetermined" the wholesale price. 602 F.2d at 632 (Pet. App. A, p. 26a) and that there was a "fixed relation" between the Crown wholesale and retail prices during the conspiracy period. 602 F.2d at 633 (Pet. App. A, p. 29a).

station[s] in Baltimore having the lowest wholesale price during each day of the damage period.[13] Then, after applying the Crown formula (*supra*) (which allowed a dealer a ¼ cent increase in margin for each ¾ cent increase in Crown's wholesale price) Dr. Christ obtained the average wholesale price differential applicable to each dealer. This figure was multiplied by the gallonage actually sold by each plaintiff during the damage period (November 24, 1970 — April 3, 1973). See 602 F.2d at 632 (Pet. App. A, pp. 26a-27a); 426 F. Supp. at 1161-62 (Pet. App. D, pp. 107a-110a).

As the District Court noted, this calculation no doubt understated plaintiffs' damages because it did not provide for any overcharge damages when all of Crown's dealer prices were uniform — which occurred repeatedly and once lasted up to six months (JA. 2108) (reflecting the achievement of Crown's goal of uniformity and periods of perfection in the conspiracy). 426 F. Supp. at 1162 (Pet. App. D, p. 110a). The single damage award to each plaintiff was less than one cent per gallon of gasoline which he purchased from Crown during the damage period (JA. 2189).

In view of the "largely successful" conspiracy, Crown's objective to achieve uniform, stable dealer pricing, the "predetermined" and "fixed" relationship between Crown's retail and wholesale prices, and the evidence of the effect

[13] Station P-57, the Crown station located at York and Padonia Roads where Crown's price-fixing efforts with Phillips Petroleum failed, was often but not always charged the lowest wholesale price. For example, the West Baltimore price disturbance (discussed *supra*) caused the Crown station there to be charged a low price until Pressler arranged to end the competiton. As the Court of Appeals held, price competition among the conspirators was virtually non-existent. 602 F.2d at 632 (Pet. App. A, p. 26a) and the wholesale prices charged to plaintiffs were usually higher and *never* lower than the lowest Crown wholesale price (the so-called "P-57" price) in town. 602 F.2d at 632 (Pet. App. A., pp. 26a-27a).

of the rare failure of the conspiracy at York and Padonia Roads (in view of "no results" from the call to Phillips Petroleum), Dr. Christ and the District Court and Court of Appeals viewed his method as a good (albeit conservative) means by which to estimate the overcharge. With respect to the choice of the lowest Crown price as the basis for the differential, Dr. Christ testified:

> [W]here you have a situation [in] which there are several firms in business and one says to another, "let's combine", and the other one says, "No", then you have to regard the price that is so achieved as a good measure of the competitive price." (JA. 2136)[14]

The Court of Appeals held, 602 F.2d at 632 (Pet. App. A, pp. 28a-30a) (a) that any "pass-on" was not chosen voluntarily by the dealers but was insisted on by Crown; (b) that "during the conspiracy period the wholesale and retail price moved in a fixed relation"; and (c) that this "immutable ratio" would *not* have applied in the absence of a conspiracy, citing PX 69, Table D (in which Dr. Christ demonstrated that, after the period, when plaintiffs were free to post prices of their choosing, there was no automatic fixed relation). The Court held further:

> Thus we cannot say with certainty that the wholesale overcharges did not injure the Crown dealers. We know that absent a conspiracy Crown's wholesale prices would have been lower. We do not know what the dealers would have charged at retail. If, in fact, a conspiracy-imposed increase in retail prices did not significantly reduce sales, it would not have been surprising if the dealers had "found" those advantageous prices in a free market. Thus Crown's pass-on argument runs afoul of the specific teaching of *Hanover Shoe*: "Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued . . . . [E]stablishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures." *Hanover Shoe, Inc.* . . . . 602 F.2d at 633 (Pet App. A, p. 29a) (footnote omitted).

Accord, *Illinois Brick*, 431 U.S. at 725, n.3.[15] Moreover, as this Court recognized in *Hanover Shoe* (and as cited by the District Court here, 426 F. Supp. at 1167-68 (Pet. App. D, p. 122a):

> The mere fact that a price rise followed an unlawful cost increase does not show that the sufferer of the cost increase was undamaged. His customers may have been ripe for his price rise earlier; if a cost rise is merely the occasion for a price increase a businessman could have imposed absent the rise in his costs, the fact that he was earlier not enjoying the benefits of the higher price should not permit the supplier who charges an unlawful price to take those benefits from him without being liable for damages. This statement

[14] Crown's expert understood — he testified that he could see that, where "there was an agreement among the conspirators that the price would not have gotten as low as it did" but where Phillips Petroleum would not go along, "[t]hey were dragged down to the level that [Phillips Petroleum] was willing to pump at." (JA. 2045). The Court of Appeals found Dr. Christ's methodology to be a "good yardstick" in estimating the overcharge. 602 F.2d at 632 (Pet. App. A, p. 27a).

[15] As Dr. Christ testified, the appropriate question to ask a plaintiff, which was unanswerable, was what prices he desired to charge during the conspiracy period but "in the absence of either vertical or horizontal price-fixing and in the presence of all the consequences that removal of price-fixing would create" (JA. 2123-24). Avoidance of such a fruitless and complex inquiry is the essential rationale of *Hanover Shoe* and *Illinois Brick*; see *Illinois Brick*, 431 U.S. at 725-26; Id. at 730-35, 737, 740-42. Permitting the "pass-on" defense here would have placed the impossible burden on indirect purchasers to demonstrate what they would have paid for gasoline — directly contrary to the holdings of *Hanover Shoe* and *Illinois Brick*.

> merely recognizes the usual principle that the possessor of a right can recover for its unlawful deprivation whether or not he was previously exercising it. 392 U.S. at 493, n. 9.

It may be appropriate in view of these citations to discuss one of Crown's contentions at this point. Since the Court of Appeals held that "there was general agreement that maintenance of these [fixed] prices did not cause a loss of retail sales," 602 F.2d at 632 (Pet App. A, pp. 26a-27a), Crown contends that plaintiffs (who, under the fixed Crown "formula", realized an additional ¼ cent in margin when Crown raised its wholesale prices by ¾ cent) necessarily gained from the conspiracy (Pet., p. 7). This contention is erroneous, as the Court of Appeals itself held. It recognized (as just cited) that the wholesale overcharges may well have injured plaintiffs; that wholesale prices would have been lower absent the conspiracy but that we do not and cannot know what prices the plaintiffs would have charged at retail or what pricing opportunities would have been presented in a non-conspiratorial market.[16] The Court of Appeals recognized that, in any event, as this Court held in *Hanover Shoe*, (quoted, *supra*) even if it could be proven that the conspiracy prices did not cause a loss in sales, that is irrelevant to plaintiffs' right to recover the unlawful overcharge. 602 F.2d at 633 (Pet. App. A, p. 29a).[17]

[16] As the Court of Appeals found, the evidence indicated that the dealers would have priced independently of the Crown formula if permitted to do so. In this regard, see not only the evidence cited by the Court of Appeals, PX 69 Table D, but also the District Court's findings of fact 47-48, 55-57, 59, 61; 395 F. Supp. at 748-51 (Pet. App. C, p. 58a, 61a-63a, 65a-67a) demonstrating that plaintiffs sought unsuccessfully *during* the conspiracy period to charge prices other than those mandated by Crown.

[17] It might also be noted that the District Court found "[convincing]" evidence that, in the absence of the conspiracy, plaintiffs' sales would have risen. 426 F. Supp. at 1160 (Pet. App. D, p. 107a). It may be that the Court of Appeals' statement (indicating "general agreement" that the conspiracy did not cause a loss in gallonage) relates to the fact that plaintiffs' annual sales increased in each year of the conspiracy. (See 395 F. Supp. at 741-42, FF 8, 12) (Pet. App. C, pp. 44a-45a) The Court of Appeals recognized, citing *Illinois Brick*, that "[n]o dealer was 'insulated from any decrease in its sales' when Crown raised retail prices." 602 F.2d at 634, n.4 (Pet. App. A, p. 30, n. 4).

As the Court of Appeals recognized, relying on *Hanover Shoe*, the damage here is the overcharge, not an assessment of lost profits. Crown's oft-repeated view that plaintiffs must demonstrate lost profits (Pet. p. 7, 14, 15n) is thus erroneous. As this Court held in *Hanover Shoe*, a lost profits analysis is arguably relevant *only* where (in contrast to the present case), *no* differential can be proved:

> We also recognize that where *no differential can be proved* between the price unlawfully charged and some price that the seller was required by law to charge, establishing damages might require a showing of loss of profits to the buyer. 392 U.S. at 494. (Emphasis added)[18]

ARGUMENT

In view of the presentation in the foregoing Statement of the Case, necessarily embracing some elements of "argument", plaintiffs' response to Crown's contention here may be limited. Crown's contention is the faulty claim that plaintiffs are not the direct purchasers from it because the wholesale price was supposedly not fixed but only "influenced" as a result of the conspiracy (Pet. p. 3; "Question Presented"). Crown states that the effect of the horizontally fixed retail prices on its wholesale prices was merely "assumed" by the Courts (Pet. p. 12). It has already been

[18] As discussed in the next section of this Brief, while arguing "pass on" vigorously before the District Court, Crown *explicitly abandoned* that claim before the Court of Appeals, and claimed only that plaintiffs could only recover lost profits, not the overcharge.

demonstrated, however, that Crown tied the wholesale price which it charged its dealers to the horizontally fixed retail price by a "fixed", "predetermined" and "constant" formula. (As dicussed previously, it is obvious that Crown's purpose in conspiring horizontally with its competitors was the goal of maintaining and increasing the revenue and profits which it received from wholesale sales of gasoline to its dealers). Thus, while the District Court found that Crown and its co-conspirators did not enter into horizontal agreements to fix their "wholesale" prices, 395 F. Supp. at 757, n. 7 (Pet. App. C, p. 77a), both the District Court and Court of Appeals found (as discussed *supra*) that, because of Crown's pricing formula, the necessary and automatic effect of the horizontal retail price-fixing conspiracy between Crown and its competitors was to fix the wholesale prices Crown charged to its dealers. This evidence, and these findings, refute the sole "question presented" by Crown (Pet., p. 3).[19]

While Crown submits to this Court questions involving *Illinois Brick*, it is noteworthy that Crown's position in this case has changed in accordance with its perceived opportunities. Thus, as the District Court held, Crown's principle argument before it, against plaintiffs' overcharge damages (apart from the routine contention advanced in every antitrust case that the estimate was "speculative") was that the pass-on defense applied and barred plaintiffs from such a recovery. 426 F. Supp. at 1162 (Pet. App. D, p. 104a). The District Court devoted a principle portion of its damage opinion to a discussion of and rejection of Crown's assertion of a pass-on defense. 426 F. Supp. at 1166-68 (Pet. App. D, pp. 118a-123a).

[19] "A 'direct' purchaser in this context is one who [like plaintiffs here] buys directly from the antitrust violator, whereas an 'indirect' purchaser is situated further down the chain of distribution." The Supreme Court, 1976 Term, 91 Harv. L. Rev. 70, 221, n. 2 (1977).

Crown admits here that the Court of Appeals did no more than affirm the District Court's overcharge damage award (which is now the sole award of damages in this case) (Pet. p. 2). Yet, Crown now advances the argument before this Court that *Illinois Brick*, this Court's 1977 reaffirmance of *Hanover Shoe*, somehow must invalidate the District Court's overcharge award, as affirmed by the Court of Appeals. If Crown seriously believed that *Illinois Brick* had this effect, it may reasonably be concluded that Crown would have made this argument in its 1978 Brief and/or Reply Brief before the Court of Appeals. Yet Crown not only did not make the argument — it never even cited *Illinois Brick* in either of these appeal briefs. In fact, on appeal, Crown withdrew its entire pass-on argument and stated that it was making only one argument with respect to these damages. In its principal appellate brief, dated April 3, 1978, at pp. 69-70, Crown stated:

> We submit that *Hanover* is simply irrelevant to the issues raised here. There is no contention that plaintiffs cannot recover because they "passed-on" any increased price to their customers. Our only contention is that even if retail prices control wholesale prices, rather than vice versa, the court's rationale cannot support the notion that plaintiffs were damaged by any agreement fixing their retail prices at higher levels than would have been charged but for the conspiracy. We note there was no claim by plaintiffs for lost profits based on decreased volume resulting from the allegedly higher retail prices.

Thus, Crown's "only contention" in 1978 was that plaintiffs could recover solely lost profits. The lack of merit of that position has already been discussed in the immediately preceding section of this brief.

Only after the Court of Appeals ruled adversely to it did Crown even mention *Illinois Brick*. In its Petition for Rehearing (July 20, 1979) Crown argued for the first time,

that, under *Illinois Brick*, plaintiffs were not the direct purchasers, and were barred from a damage recovery.[20]

The final argument to which Crown adverts (Pet. pp. 11-13), raised now for the first time in this seven year old case, is essentially a standing argument: Crown urges that, because it also engaged in vertical price-fixing, coercing plaintiffs to post prices dictated by Crown, plaintiffs should not be viewed as "direct purchasers" from it under *Illinois Brick*. Nothing in *Illinois Brick* supports this speculative extrapolation; indeed *Illinois Brick* makes clear the very narrow scope of *any* exception which it permits to the direct purchaser rule of *Hanover Shoe*. See 431 U.S. at 736, 744-45. "*Hanover Shoe* itself implicitly discouraged the creation of exceptions to its rule barring pass-on defenses, and we adhere to the narrow scope of exemption indicated by our decision there." 431 U.S. at 745.

The two Third Circuit Court of Appeals decisions cited by Crown (by analogy) only serve to reinforce plaintiffs' position here. Each case discusses an exception granting standing to sue for damages to otherwise indirect purchasers where a price-fixing manufacturer has set up a corporate "shell", collusively inserting a wholly-owned controlled subsidiary between itself and other purchasers in order that it might *insulate* itself from suit — because the "direct purchaser", its alter ego wholly-owned subsidiary, would not, of course, sue its parent.[21] In such a case, if the purchasers from the subsidiary could not sue, no one could sue, and the manufacturer would have evaded liability.[22] By contrast, the present case presents the reverse situation — plaintiffs were not collusive creations of Crown, nor willing creatures of Crown's dictates who could not have been expected to sue — in fact, they did seek to assert their pricing independence and did sue. Moreover, in the absence of the conspiracy, as the Court of Appeals found and as this Court held in *Hanover Shoe*, the prices plaintiffs would have charged cannot be known; they would not be expected to correspond to the fixed Crown formula.

The "controlled subsidiary" decisions follow from a footnote in *Illinois Brick*, 431 U.S. at 736, n. 16. This Court, having narrowly defined the sole exception to the pass-on rule of *Hanover Shoe* (the pre-existing fixed quantity cost-plus contract) added in the footnote that the "pass-on defense might be permitted . . . where the direct purchaser is owned or controlled by its customer." In *Sugar* and *Mid-West*, which involve a direct purchaser controlled by its *supplier*, the Court, arguing by analogy, developed this new pass-on exception. Its rationale, and its entire purpose (permitting the Court to ignore a wholly-owned subsidiary) is to avoid "evasion [of the antitrust laws]" by a "simple expedient." *Sugar*, 579 F.2d at 19; *Mid-West*, 596 F.2d at 589. The avoidance of such collusive

[20] Not even in that petition, however, did Crown raise the other argument it appears to advance here that, because plaintiffs are victims of not one but two *per se* price-fixing violations, (since Crown also coerced its dealers to charge retail prices dictated by Crown), Crown may thus escape overcharge damage liability to plaintiffs. That argument is raised for the first time before this Court, and is discussed next.

The first two-thirds of Crown's 1979 "Petition for Rehearing" dealt only with the District Court's remand hearing. Plaintiffs enclose, in the Appendix to this Brief, those remaining pages from the Petition which dealt with the issue of damages (Res. App. C).

[21] "Reliance upon direct purchasers to bring suit is wholly unjustified when they are controlled by the prospective defendants." The Supreme Court, 1976 Term, 91 Harv. L. Rev. 70, 230 (1977). Nor would the controlled subsidiary be expected to charge independent prices in the absence of a conspiracy. In either event, it would remain a creature of the parent and do its bidding.

[22] See *In Re Sugar Antitrust Litigation*, 579 F.2d 13, 18-19 (3d. Cir. 1978); *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 563, 587-89 (3d Cir. 1979).

evasion by a manufacturer and its alter-ego subsidiary, by erecting a new exception under *Illinois Brick,* may or may not meet with this Court's approval, but that issue is not presented here. Here, the facts are precisely the opposite and argue against an exception: there was obviously no collusion between plaintiffs and Crown to insure that plaintiffs would not sue (and thus that no one could sue); the reverse is true.

The second prong of Crown's "collusion" argument, dealing with the presence of a vertical price-fixing conspiracy here, must fall under the same rationale. Indeed, the only Court of Appeals decision discussing the specific issue of whether the addition of a vertical price-fixing conspiracy to a case should bar direct purchasers from suing is understandably *not* cited by Crown. In that case, *In Re Beef Industry Antitrust Litigation,* 600 F.2d 1148 (5th Cir. 1979), Judge Wisdom's holding recognizes that, consistent with the collusive subsidiary exception cases, a vertical price-fixing exception to *Illinois Brick,* if meritorious at all, could not apply to *Phillips v. Crown.* Thus, in *Beef,* the indirect purchasers argued for standing to sue under a "co-conspirator" exception, if they could show that the "intermediary was an equal participant in the price-fixing conspiracy", and thus it would be barred from suing under the case law holding that "when parties of substantially equal economic strength mutually participate in the formation and execution of the scheme and bear equal responsibility for the consequent restraint of trade, each is barred from seeking treble damages from the other." 600 F.2d at 1161. This argument obviously bears no relevance to the present suit, where (a) the dealers' economic strength and bargaining power here has been held *de minimis* compared to their supplying companies, see *F.T.C. v. Texaco, Inc.,* 393 U.S. 223, 226-27 (1968); *Shell Oil Co. v. F.T.C.,* 360 F.2d 470, 487 (5th Cir. 1966), *cert. denied,* 385 U.S. 1002 (1967); see, *Phillips v. Crown,* 602 F.2d at 627 (Pet. App. A, p. 15a); 395 F. Supp. at 763 and

763 n. 16 (Pet. App. C, p. 87a); and 376 F. Supp. at 1256 (preliminary injunction); and (b) far from being willing and equal partners in an illegal scheme, bearing equal responsibility for the restraint of trade and thus perhaps barred from suing, the plaintiffs here were coerced to acquiesce in the price-fixing, which they fought unsuccessfully in the marketplace and successfully in the Courts.

In *Beef,* Judge Wisdom recognized that the rationale for any new exception under *Illinois Brick* (such as the controlled, collusive subsidiary exception), if any is permissable at all, would be the recognition that "reliance upon direct purchasers to bring suit is wholly unjustified when they are controlled by the prospective defendants." 600 F.2d at 1160, n. 16. The Fifth Circuit further recognized the rule that, under *Illinois Brick,* "courts should invoke the exception only to ensure that sellers do not insulate themselves from suit . . . by *strong-arming direct purchasers into choosing not to sue.*" 600 F.2d at 1162 (emphasis added). The reasoning of *Beef* is consistent with the reasoning in *Sugar* and *Mid-West,* but such issues are totally beside the point in *Phillips v. Crown.*[23]

Crown refers to the class action litigation which grew out of the *U.S. v. SIGMA* indictment, and the certification of several classes of purchasers. *In Re Independent Gasoline Antitrust Litigation,* 79 F.R.D. 552 (D. Md. 1978). In that case the Court conditionally certified (subject to decertification if the predictable problems of damage analysis were not overcome, 79 F.R.D. at 562) two classes

[23] Judge Wisdom noted also (600 F.2d at 1163) that a case which had suggested the possible existence of a vertical price-fixing exception was *Donson Stores, Inc. v. American Bakeries Co.,* 58 F.R.D. 481 (S.D.N.Y. 1973). Crown, of course, never cited *Donson,* nor did it cite any other case on the issue of a vertical price-fixing "exception" until its present petition. In *Illinois Brick,* however, this Court cited and discussed *Donson* on another issue, 431 U.S. at 741, n. 24. If this Court wished to recognize such an exception, it could well have done so in *Illinois Brick.* In any event, as discussed, such an exception would have no relevance here.

of direct bulk purchasers from the oil companies (taxicab companies and motor vehicle dealers), two classes of credit card or charge purchasers (who purchased either directly from the oil companies which sold through company-operated stations, or from dealers, as in the case of Crown and Hess), and a class of independent service station dealers, who purchased from the conspiring oil companies.[24]

Of dispositive significance here is the fact that, in its conditional certification opinion, the District Court expressly *declined* to rule on "the possible assertion of an *Illinois Brick* indirect purchaser defense", viewing such a question as premature, because it concerned "the merits of the actions, not whether they should be maintained as class actions." 79 F.R.D. at 560, n. 9.

On November 21, 1979, just prior to the filing of Crown's petition in this Court, defendant's counsel in the class actions notified the District Court that the actions had been settled (See Res. App. D). Thus, the class action certifications were not subjected to further analysis by the District Court (concerning the decertification motions by defendants, and a subsequent ruling on the merits of any *Illinois Brick* exclusion of indirect purchasers). Neither, of course, was the case subjected to appellate review by the

[24] Plaintiffs' antitrust counsel in *Phillips v. Crown*, Frank, Bernstein, Conaway & Goldman, did not represent any plaintiffs in the class actions.

The Court in *Beef* noted also that, where the alleged "co-conspirator" middlemen were not named as parties-defendant in the class action, no exception to *Illinois Brick* should be permitted, because of the possibility of inconsistent adjudications. (The defendant-manufacturer should be able to prove in the same lawsuit that the middlemen were willing, collusive participants and equal partners, thus barring the middleman from suing. If such allegations were tried in two forums, the risk of inconsistent adjudications existed). 600 F.2d at 1163.

Fourth Circuit. It is, accordingly, pure speculation by Crown as to whether there could have been possible "duplicative" damage exposure in the class actions.[25]

It is noteworthy that whatever recovery was obtained in the settlement of the class action did not even approach "full compensation." There was no class of cash purchasers of gasoline, and, in its decision, the District Court recognized (even without reaching any *Illinois Brick* indirect purchaser issues) that *no* recovery would be possible by any such class, in view of the dearth of records and the impossibility of management of such a class. 78 F.R.D. at 562. Thus, whatever classes would ultimately have recovered if the class action had proceeded, the vast majority of motorists could never recover damages from the defendants flowing from a multi-state conspiracy.[26]

[25] The District Court noted that, in opposing certification of the dealer class, the defendants (of which Crown was one) argued that dealers must show they were *coerced* (vertical price-fixing) in order to recover — a position inconsistent with Crown's position here. 78 F.R.D. at 560.

Apart from every other argument which has been discussed in this brief, it would be, to say the least, anomalous that the dealers in the class action achieved a measure of compensation, while the plaintiffs here (the dealers without whose efforts there could have been no "independent gasoline antitrust litigation") where denied their right to damages.

[26] The District Court, 78 F.R.D. at 562, n. 10, cited Judge Augelli's decision in *City of Philadelphia v. American Oil Co., et al.*, 53 F.R.D. 45, 71-72 (D.N.J. 1971) in which the Court refused certification of a class of cash purchasers. In the intervening years, the problems attendant to certification of such a class (even assuming the unlikely possibility that it could achieve standing) have not decreased. Cf. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

CONCLUSION

Phillips v. Crown is grounded in the basic principles of *Hanover Shoe* and *Illinois Brick*. As the Court of Appeals recognized, the complexities inherent in tracing what could have occurred in the absence of the price-fixing here are precisely those complexities, those speculations, and those unanswerable questions, the avoidance of which is the principle rationale for this Court's holdings in *Hanover Shoe* and *Illinois Brick*. See 431 U.S. at 725-26; see *id* at 730-733, 737, 740-42. Moreover, the second reason underlying these cases' establishment of an "automatic recovery of the full overcharge by the direct purchaser," *Illinois Brick*, 431 U.S. at 730; see Id. at 735, is the "longstanding policy of encouraging vigorous private enforcement of the antitrust laws." 431 U.S. at 745. Few cases exemplify better than *Phillips v. Crown* the salutary nature of this Court's policy. In the course of a seven year battle, four service station dealers, direct purchasers with the incentive to sue and the fortitude to endure the fight, established not only a horizontal price-fixing conspiracy in the Baltimore market, but also exposed the existence of a conspiracy which spread across the Middle Atlantic states, thereby enabling the United States government to institute a successful criminal prosecution.

This Court should not grant *certiorari* in this case, where to do so would undermine the objectives sought and achieved by its previous decisions.

Respectfully submitted,

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January 25, 1980

APPENDIX A

United States Court of Appeals
For The Fourth Circuit

Nos. 77-1780 & 78-1078

(Filed September 6, 1979)

JOHN T. PHILLIPS, JR., CORRADO FRANK TUMMINELLO, CHARLES PHILLIP FREITAG, AND CARROLL CHARLES MYERS,

Plaintiffs-Appellees,

versus

CROWN CENTRAL PETROLEUM CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey, II, District Judge.

Upon consideration of a motion of the appellant, by counsel, for stay of mandate pending application to the United States Supreme Court for a writ of Certiorari,

IT IS ORDERED that the motion is DENIED.

For the Court — by Direction.

/s/ WILLIAM K. SLATE, II,
Clerk.

APPENDIX B

United States Court of Appeals
Fourth Circuit

TO ALL COUNSEL

POLICY STATEMENT

STAYS OF MANDATE

A mandate will not be stayed in any case except by order of the Court for good cause shown. To constitute "good cause shown" there must be a finding by a circuit judge that a substantial question is to be taken to the Supreme Court of the United States.

The original copy only of a motion for stay of the mandate need be filed; duplicate copies are not required.

WILLIAM K. SLATE, II,
Clerk.

Rev. 8/27/76

[EXCERPT] APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Nos. 77-1780, 78-1078

JOHN T. PHILLIPS, JR., CORRADO FRANK TUMMINELLO, CHARLES PHILLIPS FREITAG, and CARROLL CHARLES MYERS,

Plaintiffs-Appellees,

v.

CROWN CENTRAL PETROLEUM CORPORATION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

APPELLANT'S PETITION FOR REHEARING, AND SUGGESTION FOR REHEARING EN BANC

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2. THE PANEL'S DECISION TO UPHOLD THE AWARD OF "HORIZONTAL DAMAGES" DIRECTLY CONFLICTS WITH ILLINOIS BRICK.

The rule of *Illinois Brick* is that the direct purchaser at the fixed price is entitled to recover the full amount of the overcharge and that no party at any other level of the manufacture or distribution chain can trace the overcharge to its level and claim an allocated portion of the overcharge. *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 at 728-29 (1977). That rule was violated here.

The panel recognized that the two damages theories adopted by the district court "are only loosely related to the facets of the conspiratorial scheme" (*Slip. Op.* 25) and reflect the district court's own confusion over the damages property attributable to the conspiracy found (*See* Slip. Op. 15, n.2). The panel reversed as to one theory — vertical damages — noting, *inter alia,* that the district court's methodology was "seriously flawed" and its assumptions were of "demonstrable falsity" (Slip Op., pp. 31-34). It approved the lower court's other theory that the true measure of plaintiffs' damages from the conspiracy was the portion of a retail overcharge that plaintiffs paid. This decision squarely conflicts with the Supreme Court's decision in *Illinois Brick*.

a. *Plaintiffs Were Not Direct Purchasers at the Fixed Price*

In *Illinois Brick*, the Supreme Court declared that "the overcharged direct purchaser, *and not others in the chain of manufacture or distribution,* is the party 'injured in his business or property' within the meaning of [Clayton Act Section 4]" (431 U.S. at 729). These direct purchasers at the fixed price are entitled to recover the full amount of the illegal overcharge, to the exclusion of all indirect parties (*Id.* at 724). Since the conspiracy in this case was found "to maintain retail prices above competitive levels" (Slip Op. 33, 8-14), the consumers were the direct purchasers at the fixed price and paid the full amount of any retail

price overcharge resulting from the conspiracy. Four consumer classes which [sic] been certified are suing for damages arising from alleged retail price fixing throughout the Middle Atlantic states, including Baltimore.[8] Independent Gasoline Antitrust Litigation, MDL Docket # 267 (D. Md.).

Sound policy considerations cited by the Supreme Court support the conclusion that retail purchasers at the allegedly fixed retail prices were injured and entitled to sue for damages (*See* 431 U.S. at 746). Conversely, as shown in Part b below, since plaintiffs were actually beneficiaries and not victims of any higher retail prices maintained because of the conspiracy, they have no right to compensation (*Id* at 735, 746).

b. *The "Horizontal Damages" Were Impermissibly Calculated From Assumed Increases in the Wholesale Prices Which Were Not Fixed By The Agreement*

The *Illinois Brick* rule should be applied here for the same reasons that caused the Supreme Court to enunciate it in the first place: at present the holding in this case creates the very evils the Supreme Court there sought to avoid.

In the *Illinois Brick* decision, the Court decided that persons other than the actual purchaser paying the price fixed by the agreement would not be allowed to trace the "overcharge" to other prices in the chain of distribution which may have been influenced by the fixed price. In particular, the Supreme Court held that a purchaser of a building could not claim that a fixed price for a component — concrete block — had been passed-on and increased the

[8] Consumers who suffer damages as a result of horizontal and vertical price fixing activities are entitled to recover under the antitrust laws. Reiter v. Sonotone Corp., 99 S. Ct. 2326, 2329 (1979). Morever, plaintiffs originally brought this suit to prevent Crown from terminating their leases pursuant to the alleged price-fixing conspiracy. Crown is not here contending that plaintiffs are precluded from suing for injunctive relief. See Mid-West Paper Co. v. Continental Group, Inc., 596 F.2d 573, 598-95 (3rd Cir. 1979).

cost of the building to him (431 U.S. at 728-29). While this case does not involve a claim by someone to whom the increased charge was passed on and, instead, involves a claim by plaintiffs who were unable to obtain the benefit of the full increased charge that they are entitled to the remainder, exactly the same principle is applicable.

The *Hanover Shoe*[9] and Illinois Brick decisions do not relieve plaintiffs of the burden of proving injury and damage within the meaning of Section 4 of the Clayton Act. As the panel described the relationship between the fixed retail price and the wholesale price (Slip Op., p. 26) (emphasis supplied):

> Each increase in the retail price at the pump was divided between the dealer and Crown on a one-to-three basis. Thus, if there were an increase in the retail price of 1 cent a gallon, the dealers' gross profit margin was *increased* by ¼ of 1 cent, while Crown's wholesale price was increased ¾ of 1 cent. *Since the higher the price the wider the dealer's margin*, each dealer had a substantial incentive to comply with Crown's directions about retail prices, and there was no counter-incentive since there was general agreement that *maintenance of these prices did not cause a loss of retail sales.*

The very recitation of that relationship establishes that retail price increases resulted in higher profit margins for the dealers and no loss of sales — and that Plaintiffs suffered no injury as a result of retail price increases. The district court found there was "no evidence of . . . similar agreements to fix wholesale prices" to Crown dealers, including plaintiffs (App. 1454). Consequently, it is clear error to treat a theoretical wholesale overcharge calculated by plaintiffs' expert from a "retail price overcharge" as a substitute for the requirement that plaintiffs prove that they were damaged within the meaning of the antitrust laws.

[9] Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).

c. *The Panel Opinion Exposes Crown to Duplicative Damages*

Under these circumstances, Crown is obviously being subjected to risks of duplicative recoveries if the panel's decision is permitted to stand. Under *Hanover Shoe* and *Illinois Brick*, if there were retail price fixing, Crown is clearly liable to consumers for the entire amount of the overcharge. If as the panel here has held, Crown is also liable to plaintiffs for ¾ of the retail overcharge, duplication has occurred. The Supreme Court has repeatedly recognized that defendants should not and will not be put in this position. *E.G., Illinois Brick, supra*, 431 U.S. at 730-31; *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 264 (1972).

The panel's opinion on damages flies in the face of virtually every important principle expressed by the Supreme Court in *Illinois Brick*. The panel opinion permits an overcharge recovery by plaintiffs who are not direct purchasers at the fixed price. It allows proof of these damages by a tracing *from* the direct purchaser at the fixed price, then denies to Crown the use of this same methodology defensively to demonstrate plaintiffs did not suffer damages. Finally, it ignores the inevitable consequence of its holding — duplicative recovery of damages.

CONCLUSION

For the above-stated reasons, it is respectfully submitted that this petition for rehearing be granted, the case be considered *en banc*, and the judgment of the district court be reversed and the case be remanded for a new trial.

Respectfully submitted,

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Dated: July 20, 1979.

APPENDIX D

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(202) 783-0800

November 21, 1979

The Honorable C. Stanley Blair
United States District Court
for the District of Maryland
United States Court House
101 W. Lombard Street
Baltimore, Maryland 21201

Dear Judge Blair:

RE: Independent Gasoline Antitrust
Litigation; M.D.L. 267

This is to confirm that all parties to the above-captioned action have reached an agreement to settle all the cases consolidated for pretrial purposes under M.D.L. 267. Counsel for all parties have not only agreed upon a settlement amount but also have agreed in principle upon the major provisions of a formal Settlement Agreement.

Both plaintiffs' and defendants' counsel have had several meetings during the past several weeks and will meet again in the near future. We expect that all necessary papers will be presented to the Court for review and approval by mid-December, 1979.

Counsel request that all return dates on pending motions and Court orders be held in abeyance pending the filing of the settlement papers with the Court.

Thank you for your consideration.

Respectfully yours,

Ray S. Bolze

RSB/pep

cc: All Counsel of Record.